

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JONAS LOWNSBERY,

Defendant-Appellant.

UNPUBLISHED

June 26, 2014

No. 314901

Montcalm Circuit Court

LC No. 2011-014303-FH

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant Jonas Lownsbery was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with an individual under 13 years of age). He was sentenced as an habitual offender, second offense, MCL 769.10, to 42 months to 22-½ years' imprisonment. He appeals his conviction and sentence as of right. We affirm.

The victim testified at trial that on the weekend of May 8, 2010, when she was 12 years old, she stayed the night with her two friends at defendant's residence. The victim and her two friends slept on the floor of defendant's living room. The victim slept closest to the couch. During the night, the victim awoke to find her blanket pulled down to her waist and defendant lying on the couch with his arm extended, touching the victim's breast over her sweatshirt. Defendant had his eyes closed and appeared to be asleep, though the victim testified she believed he was just pretending. The victim responded by getting up. She attempted to wake her two friends but could not. She took her cellular phone into the bathroom, where she called and sent text messages to various people, including her mother, her sister and her friend's mother. The victim finally reached her mother and told her she was scared and wanted to go home. She did not tell her mother what happened. The victim was picked up from defendant's residence shortly thereafter. She was reluctant to talk about the incident with her mother or her friends' mother, however she did tell her sister the following morning, whereupon the police were contacted. Defendant denied the allegation at trial but was ultimately convicted.

I. VIOLATION OF DISCOVERY RULES

On appeal, defendant first argues the trial court erred by failing to grant his request for a mistrial based on the prosecutor's alleged violation of discovery rules. "We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs where the trial

court's decision falls "outside the range of principled outcomes." *Id.* "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (internal quotations and citation omitted).

Specifically, defendant argues that a text message sent by the victim to her sister disclosing defendant touched her inappropriately while she was sleeping was not disclosed. Defendant did not know about the text message, the only evidence to show the victim disclosed abuse on the night of the incident. Defendant argues the prosecution was required to provide the text message under the rules of discovery, but failed to do so. He further argues this failure irreparably damaged his credibility and prejudiced his defense. His theory of the case, explained to the jury before he was aware of the text message, was that the victim never disclosed any sexual abuse until the following morning, after she was influenced by her mother and others. The prosecution contends it never had possession of the text message itself, but rather only learned about it through an interview with the victim's sister one week before trial.

MCR 6.201(A)(2) states a party must, upon request, provide an opposing party with "any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial . . ." However, there is "no compelling policy reason" to interpret MCR 6.201(A)(2) to require disclosure of an attorney's witness interview notes because "[b]oth sides in a criminal proceeding already benefit from the liberal, reciprocal discovery afforded by MCR 6.201[.]" including disclosure of the names and address of all lay and expert witnesses, which allows "parties to arrange their own interviews with the opposing parties' trial witnesses." *People v Holtzman*, 234 Mich App 166, 188; 593 NW2d 617 (1999).

The record reflects defendant requested discovery from the prosecution at the outset of this case pursuant to MCR 6.201. Thus, the prosecution had a continuing duty to provide defendant with all discovery material that fell within the rule. MCR 6.201(H). We agree with defendant that the text message from the victim to her sister is an electronically recorded statement of a witness such that, if in its possession, the prosecution was required to provide to defendant under MCR 6.201(A)(2). The record does not indicate the prosecution ever had possession of the text message. Rather, the prosecution only had knowledge of the text message through a pre trial interview of the victim's sister where she recited what it allegedly said. The text message itself was never produced at trial and never admitted into evidence. Therefore, the only written version of the text message was the prosecution's witness interview notes, which the prosecution was not compelled to provide. *Holtzman*, 234 Mich App at 188. Because defendant was capable of discovering the existence and contents of the text message on his own by interviewing the victim's sister and did not, we conclude there was no discovery violation. *Id.* Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Schaw*, 288 Mich App at 236.

II. OTHER ACTS EVIDENCE

Defendant next argues the trial court erred in allowing the introduction of other-acts evidence. We review preliminary questions of law, such as whether a rule of evidence precludes admissibility, de novo, but a trial court's decision whether to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The challenged evidence is testimony from the victim about a previous incident in 2008, when she was eleven years old. The victim testified she was sleeping on a pull-out couch in defendant's living room next to her friend when she awoke to find her nightgown pulled up to her stomach and defendant lying on the floor next to her with his arm extended, touching her vagina underneath her underwear. The victim never saw defendant's eyes open. The touching continued until the victim rolled away. The victim did not tell anyone about this encounter until months later when she discussed it with her friend. The victim did not stay at defendant's home again until the weekend of May 8, 2010, when the charged conduct occurred.

The testimony was admitted, over defendant's objection, pursuant to MCL 768.27a. That statute provides, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." Our Supreme Court made clear MCL 768.27a permits admission of propensity evidence even if its only relevance is to show the character of the defendant. See MRE 404(b); *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). Therefore, the trial court did not err in determining the rules of evidence do not preclude admissibility of the testimony.

While the victim's testimony of an alleged prior act is admissible, the probative value of evidence admitted under MCL 768.27a must still outweigh its prejudicial effect. See MRE 403; *Watkins*, 491 Mich at 481. "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect[.]" and must not exclude the evidence "merely because it allows a jury to draw a propensity inference." *Id.* at 487. In conducting an MRE 403 balancing test, the trial court should consider several factors:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of other acts to the charged crime, (3) the frequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. [*Id.* at 487-488]

Upon the admission of other-acts evidence under MCL 768.27a, the trial court can ensure the evidence is properly considered by issuing a limiting instruction to the jury. *Id.* at 490.

Defendant does not dispute the applicability of MCL 768.27a or the relevance of the testimony. Defendant argues under MRE 403 the testimony's "probative value is substantially outweighed by the danger of unfair prejudice." Accordingly, we analyze the testimony under the balancing test set out in *Watkins*. *Id.* at 487.

First, the charged and uncharged conduct both consisted of defendant's opportunistic predation of the victim at times when she was sleeping. Moreover, both the charged and uncharged conduct were facilitated in substantially similar ways; defendant lying down next to the victim, removing her coverings, and touching her intimate parts while pretending to be asleep. Second, the charged and uncharged conduct occurred less than two years apart. Defendant's lack of access to the victim during this period tips this factor in favor of probative

value. Third, the victim's friend provided testimony that supported the other event took place, even though her testimony corroborated only the surrounding circumstances and not the actual act. Fourth, there was a need for evidence beyond the testimony of defendant and the victim because there was no physical evidence and defendant challenged the victim's credibility. Finally, the trial court gave a limiting instruction to the jury that ensured the jury properly employed the evidence. *Watkins*, 491 Mich at 490. We conclude the trial court did not abuse its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403.

Defendant also contends his due process rights were violated because the evidence was unfairly prejudicial, therefore denying his right to a fair trial. This claim lacks merit. In *Watkins*, 490 Mich at 486 n 82, our Supreme Court found it unnecessary to address the due process implications MCL 768.27a in light of its holding evidence admissible under that statute nonetheless remains subject to exclusion under MRE 403. In this case, the trial court concluded, and we agree, the other acts evidence was not unfairly prejudicial under MRE 403. Accordingly, the admission of the evidence did not violate defendant's due process right to a fair trial.

III. OFFENSE VARIABLE SCORING

Defendant finally argues the trial court erred in scoring offense variable (OV) 9 of the legislative sentencing guidelines, resulting in an incorrect sentence range. We review a trial court's factual determinations under the sentencing guidelines for clear error to determine if they are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation" that we review de novo. *Id.*

OV 9 applies to the number of victims and provides ten points may be scored where between two and nine victims were "placed in danger of physical injury or death." MCL 777.39(1)(c). OV 9 mandates a court "[c]ount each person who was placed in danger of physical injury or loss of life . . . as a victim." MCL 777.39(2)(a).

This Court has previously held when multiple vulnerable persons are present at the time of a criminal sexual conduct offense, such that the defendant had a "choice of victims," each of the persons present is "in danger of physical injury" and therefore a "victim" for purposes of OV 9. *People v Waclawski*, 286 Mich App 634, 684; 780 NW2d 321 (2009). Such was the case

here. The evidence established the victim was sleeping in the living room in close proximity to two other underage girls at the time of the offense. Defendant argues the other two girls were in “no danger whatever.” However, the presentencing report contains a statement from one of the other two girls that defendant touched her in her sleep a month earlier. Since it is clear defendant did not simply have a fixation on the victim in this case, it is reasonable to conclude defendant had a “choice of victims,” *id.*, and he chose the victim over the other two girls. Accordingly, the other two girls were “in danger of physical injury” for purposes of OV 9 and the trial court did not err in scoring ten points under that variable.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck